

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-207414

DATE: October 15, 1982

MATTER OF: Ling/L.A.B., subsidiary of
Mechanical Technology, Inc.

DIGEST:

1. Protest against agency decision not to withdraw set-aside after number of offerors was reduced to one is timely where record does not indicate when protester either knew or should have known that only one offeror remained.
2. Protester whose status changes from small business to large business during course of small business set-aside procurement is an interested party to challenge validity of set-aside under which protester was excluded from competition; however, GAO cannot question adequacy of competition for set-aside under the circumstances.
3. Protester has burden of establishing that price agency intends to pay successful offeror under small business set-aside is excessive and unreasonable so as to require agency to withdraw set-aside. In absence of indication of fraud or bad faith, GAO will not question agency determination of price reasonableness.

Ling/L.A.B., a subsidiary of Mechanical Technology, Inc. (Ling), protests any award under request for proposals (RFP) 8-2-104-47842-01, which was issued as a small business set-aside by the National Aeronautics and Space Administration (NASA). Ling asserts that NASA improperly failed to withdraw the set-aside once it became apparent that only one

(Unholtz Dickey (UD)) of three small businesses submitting proposals remained eligible for award. Ling was eliminated by a change in its size status following the submission of its offer, while the second offeror (Vibrations Sales & Service (VSS)) was rendered ineligible by its tender of foreign equipment. Additionally, Ling contests UD's small business status.

NASA urges that we dismiss Ling's protest for two reasons: (1) it is untimely and (2) Ling is no longer an interested party. In the alternative, NASA urges that we deny the protest because: (1) the adequacy of available small business competition for the initial set-aside decision is determined prior to issuance of the solicitation and (2) UD's offer is reasonable in view of the Government estimate.

We deny the protest, in part, and dismiss it, in part.

Timeliness

We find the Ling protest timely since it is not a protest against the initial decision to set aside the procurement, but rather a protest against a subsequent decision not to withdraw the set-aside when the competitive field diminished to a single offeror. NASA argues that Ling either knew or should have known of its ineligibility months prior to its protest when, in December 1981, a large business acquired 93 percent of Ling's stock. However, since Ling's position is that NASA should have withdrawn the set-aside when only UD remained eligible for a small business award, it is necessary for NASA to establish when Ling either knew or should have known that all competitors save UD had been eliminated. The record does show that by letter of March 23, 1982, NASA advised VSS of disqualification and NASA's intent to award the contract to Ling. VSS, by letter of March 30, 1982, acknowledged its disqualification and informed NASA of a magazine article which

announced that Ling had been acquired by a large business. On April 20, 1982, NASA wrote Ling and informed it that as a result of VSS's disclosure and Ling's confirmation of the same, Ling was ineligible for award. NASA advised Ling that UD was the next firm in line for award. It did not say that UD was the only firm remaining in the competition. Consequently, we cannot find Ling's May 7, 1982, protest to our Office untimely on the record before us.

Interested Party

NASA contends that Ling is no longer an interested party under our Bid Protest Procedures, 4 C.F.R. § 21 (1982), because Ling is now a large business and ineligible for award under the set-aside. We disagree.

Generally, in determining whether a protester is an interested party, we consider a variety of factors, such as the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. We do this to insure the protester's diligent participation in the development of the protest, which, in turn, tends to sharpen the issues and provide a better record on which to judge the propriety of the procurement. Coleman Transfer and Storage, Inc., B-182420, October 17, 1975, 75-2 CPD 238. Ling could compete for the award if its protest that the set-aside should be withdrawn were sustained. Therefore, we cannot say that Ling's protest is extraneous to the set-aside procurement under which Ling was excluded from the competition. Consequently, we conclude that Ling is an interested party and that its protest should be considered.

Withdrawal of Set-Aside

Authority for Ling's assertion that NASA can withdraw the set-aside after receipt of proposals is found at NASA Procurement Regulation 1.706-3(a), which provides:

"If, prior to award of a contract * * * the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), he may withdraw a * * * set-aside determination by giving written notice to the small business specialist, and the SBA representative if available, stating the reasons for the withdrawal."

Notwithstanding this authority, we have held that the Government may pay a premium price to small business firms on restricted procurements in order to implement the purpose of the Small Business Act, 15 U.S.C. § 631 (1976 ed.), which is "to insure [that] a fair proportion of the total purchases * * * for the Government be placed with small business enterprises"; however, an excessive and unreasonable price may not be paid. North American Signal Company, B-190972, May 19, 1978, 78-1 CPD 387.

The issue, then, is whether UD's price is excessive and unreasonable. This issue is for the contracting officer to decide, and we will not disturb it where it is supported by a rational basis. Schottel of America, Inc., B-190546, March 21, 1978, 78-1 CPD 220. NASA has determined that UD's price is reasonable in comparison to the Government estimate and that it is not so far out of line with the low, ineligible offer as to require cancellation and readvertisement. While NASA has not disclosed these figures to the protester, we have reviewed them and cannot question NASA's conclusion. Ling argues that it is improper for the contracting officer to consider prices that could amount to as much as 25 percent over the price a large business (Ling) would charge for the same items. Nevertheless, it is our position that a party attempting to demonstrate the unreasonableness of a contract price has the affirmative burden of proving its case and that, absent an indication the contracting

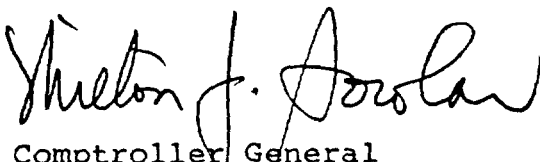
officer was motivated by either fraud or bad faith in deciding the issue of price reasonableness, we will not question the decision. Anderson - Cotton-wood Disposal, 58 Comp. Gen. 713 (1979), 79-2 CPD 98. Ling has not, in our view, met this burden.

Regarding Ling's contention that following the elimination of Ling and VSS from the competition there was insufficient competition available from small business concerns, we disagree.

The record indicates that there was a reasonable expectation of offers from a sufficient number of small business concerns at reasonable prices even though, ultimately, only one eligible small business offer remained for consideration. The fact that only one acceptable offer was received does not affect the propriety of the determination to make the set-aside which was made prior to the issuance of the solicitation. Moreover, UD's offer was tendered prior to Ling's elimination, so UD in pricing its offer could well have contemplated competition from Ling, a small business at that time. This is likely because Ling reports that prior to its becoming a large business, UD and Ling were the only small business manufacturers of solid state amplifiers of sufficient size to meet NASA requirements.

Finally, Ling questions UD's eligibility as a small business. This concern, which was first raised by Ling in its June 21 letter to us, is for the consideration of the Small Business Administration, not our Office.

We deny the protest, in part, and dismiss it, in part.


for Comptroller General
of the United States